In The

Supreme Court of the United States

October Term, 1977

No. 77-1674

FRED R. FIELD, JR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT AND OPINION BELOW

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 24, 1978 (Appendix A) affirming his criminal conviction on December 2, 1977, after a trial before Hon. Morris E. Lasker, U.S.D.J., and a jury, in the United States District Court for the Southern District of New York. Petitioner was convicted upon all counts of a ten count indictment growing out of charges that, during a six year period

of time from 1968 to 1974, and while being a labor union official, he solicited and received unlawful payments from an employer.

Petitioner was additionally charged with income tax violations for failing to report the proceeds of these activities. Thus, petitioner was convicted upon one count of "Racketeering" activity for having been engaged in a "pattern" of receiving payments from an employer (18 U.S.C. §§1961, 1962); four counts of accepting unlawful payments from an employer (29 U.S.C. §186[b]); conspiracy to violate both of the above-indicated statutes (18 U.S.C. §371) and, four "tax" counts for "attempting to evade" (26 U.S.C. §7201) and "false statements" in tax returns (26 U.S.C. §7206) relating to the tax years 1971 and 1974.

Petitioner was sentenced concurrently on all counts to a term of thirty-six (36) months in the custody of the Attorney General, one (1) year of which is to be in actual confinement, and the balance being suspended in favor of probation. On each count, petitioner received a cumulative, non-committed $5,000 fine ($50,000 in fines, in total).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. As applied to the facts in the instant case, is the Anti-Racketeering Statute, 18 U.S.C. §§1961 and 1962, *ex post facto* in operation and, therefore, violative of Article I, §9, Clause 3 of the United States Constitution? Moreover, was not petitioner's prosecution for activities in 1968 violative of the Statute of Limitations?

2. Where proof of economic duress, coercion, and fear of petitioner accounted for the acquiescence of a highly vulnerable employer to make 'pay-offs' to petitioner — a labor union official — did the trial court err in failing to give to the jury the issue of whether the threats made by petitioner to cause grave economic harm rendered the employer and his agents "victims" rather than co-conspirators and accomplices of petitioner? Where the balance of terror so far outweighs employer complicity in making pay-offs to a labor union official, must the employer and his knowing agents be treated as co-conspirators, thereby opening the door to the admission of hearsay from the employer and his agents?

3. Were the misdemeanor counts for Receiving a Payment (29 U.S.C. §186) multiplicious to the Racketeering count (18 U.S.C. §§1961, 1962) so that election of counts and/or merger was improperly denied?

4. Did the trial court improperly impose a felony judgment under the hybrid conspiracy count which alleged violation of both a felony and a misdemeanor statute?

STATEMENT OF THE CASE

Petitioner has been the General Organizer of the International Longshoreman's Association (hereafter I.L.A.), a national labor organization headquartered in New York City with local affiliates in most ports along the Atlantic, Southern and Gulf Coasts of the United States. Petitioner has held this position in excess of twenty years, as well as other I.L.A. posts on a regional and local level, including a position as President of the Banana Handlers Council of the I.L.A. — an organization concerned with working conditions relating to the unloading of banana boats at the aforesaid ports.

In December 1976,[1] petitioner was indicted upon various charges growing out of claimed "shakedowns" in 1968-69 and 1971, of a major importer of bananas — United Brands, Inc.[2] The thrust of the Government's case is that petitioner threatened to cause disruption in the unloading of banana cargoes unless he was 'paid off'. According to the proofs, all of petitioner's alleged extorsive dealings against United Brands were directed solely to the latter's labor relations house counsel — Beverly Hackmann. While Hackmann testified to delivering to petitioner $41,000 in 1968-69, $48,500 in 1971, and $35,000 in 1974, there was no eyewitness to the claimed extortion or to the alleged turn-overs of cash by Hackmann to petitioner. Various company officers, apart from Hackmann, however, did testify to more or less contemporaneous claims made by Hackmann to them that money was needed to pacify petitioner. Their testimony came into the case not only to show 'state of mind' of the extortion

1. In May 1977, a superseding indictment added new allegations relating to alleged payments in 1974 as well, two tax counts for evasion and two tax counts for tax fraud (26 U.S.C. §§7201, 7206). The tax counts relate to moneys allegedly received in 1971 and 1974.

2. United Brands Inc. and United Fruit Co. are parent and subsidiary respectively.

victims, but as substantive proof of petitioner's complicity, even though such testimony was hearsay as to what Hackmann had told them. These United Brands officials acted to provide to Hackmann the amounts which he reportedly needed to 'pay off' petitioner. Various records preserved by United Brands documented travel by Hackmann between corporate offices in Boston and New York. Largely based upon the dates shown by certain of Hackmann's trips to New York City, he claimed meetings with petitioner and the surrender to him of the amounts demanded to ensure uninterrupted banana shipments.

Petitioner's defense consisted mainly of several union officials from various Southern and Gulf Coast I.L.A. locals or district level organizations, who testified concerning the history of discharging perishable cargo during general strikes of the I.L.A. These witnesses confirmed the fact that, in every strike within recall, the I.L.A. policy in the Southern and Gulf Coast ports was to discharge perishable cargoes, including bananas. Several reasons were given for adherence to this policy of continuing to "work perishables" notwithstanding the fact that all ports were otherwise deliberately tied up. It was pointed out, for example, that the I.L.A. did not want unfavorable publicity for causing cargoes to rot. Additionally, it was observed that the states where perishables were unloaded were, by and large, "Right to Work" states where non-union labor could, and would, unload perishables if called upon to do so. Since perishables would be discharged in any event, it was better to allow union labor to keep on working with this type of cargo. Otherwise the rank and file would lose earnings. Moreover, at the conclusion of the strike, labor would be paid retroactive increases.

Thus, it was shown that petitioner was not in any position to close up ports where bananas had been traditionally unloaded during so-called 'general strikes'; and that United Brands personnel had no reasonable basis to ascribe to petitioner the

power to tie up banana operations in such 'free' ports in view of their own intimate knowledge of the long history of amnesty as to perishables which prevailed in Southern and Gulf Coast ports.

REASONS FOR GRANTING THE WRIT

I.

18 U.S.C. §§1961 AND 1962 ARE *EX POST FACTO* LAWS VIOLATIVE OF ARTICLE I, §9, CLAUSE 3 OF THE UNITED STATES CONSTITUTION. MOREOVER, PETITIONER'S PROSECUTION FOR ACTIVITIES IN 1968 WAS VIOLATIVE OF THE STATUTE OF LIMITATIONS.

Petitioner interposed a written motion to dismiss the indictment contending that the Racketeering Statute, 18 U.S.C. §§1961 and 1962, was constitutionally defective for being an *ex post facto* law, and that the statute, in this case, depended in a substantive way upon violations of law which, in any event, violated the statute of limitations. The trial court entered a written decision denying the motion.

Petitioner was charged in Count 1 under 18 U.S.C. §§1961 and 1962 with having received unlawful payments as a union official on seven (7) occasions in 1968 and 1969 and on seven (7) other occasions from September 1971, through December 13, 1971.[3] The receipt of those payments was alleged to constitute a pattern of Racketeering Activity under 18 U.S.C. §1961(5) — a crime made out by proof of at least two acts of Racketeering Activity taking place within ten (10) years of each other, with one such act occurring after the effective date of the statute (October 15, 1970).

3. In a superseding indictment, additional payments in 1974 were alleged, and four tax counts for the years 1971 and 1974 were added.

Petitioner was charged under Count 1 with having received unlawful payments as a union official in 1968 and 1969. As petitioner was not indicted until December 1976, these 1968 and 1969 transactions would normally fall outside of the five (5) year statute of limitations applicable in cases of federal non-capital felonies (29 U.S.C. §186; 18 U.S.C. §3282). We contend therefore, that the criminal offenses allegedly committed by petitioner in 1968 and 1969 should not have been prosecutable in 1976, and at the trial, by virtue of the statute of limitations which we vainly invoked in our pre-trial motions.

It was urged by the Government, however, that the crime for which petitioner was prosecuted under 18 U.S.C. §§1961 and 1962 is that of Racketeering Activity — a supposedly different crime from the bare act of receiving unlawful payments as a union official from an employer which receiving is proscribed by 29 U.S.C. §186. Manifestly, this alleged difference in crimes is semantic only, since both statutes require the same basic activity (receiving a payment from an employer), albeit 18 U.S.C. §§1961, 1962 makes two (2) instances of such conduct within 10 years an ostensibly different and more grave crime; that is, Racketeering Activity.

The Government's position overlooks the fact that proof of receiving illegal payments in 1968 and 1969 was an integral part of its case under the alleged Racketeering Activity rubric. The offering of such proof under Count 1 was not merely to prove a pattern, lack of mistake, motive, or to establish identity of the petitioner as the culprit, but to prove the prior acts *themselves*, in a substantive way, as constituent parts, albeit earlier ones, of the crime of Racketeering Activity which is now defined to require a multiplicity of acts constituting a "pattern". Avoidance of the statute of limitations should not depend upon such a transparent device.

The reach of §§1961 and 1962 is also defective for these statutes, if applied to petitioner's 1968 and 1969 activities, will

have an *ex post facto* effect (U.S. Const. Art. 1, §9, Cl. 3). By treating petitioner's activities in years *prior* to the passage of the Racketeering Activity statute as lawless incidents to be proved on the case in chief, §1961(5) of Title 18 is defining crime retroactively. Petitioner's earlier activities, predating passage of the 1970 Statute in question, are by such statute defined for the first time as "Racketeering Activity" and are being sought to be punished *as such* for the first time, even though in 1968 and 1969 such a crime — "Racketeering Activity" — in relation to receiving payments from employers was not known to our laws.

The decision of the United States Court of Appeals for the 9th Circuit in *United States v. Campanale*, 518 F.2d 352, 364[4] concludes that §1961(5) of Title 18 is not *ex post facto* — since the earlier, pre-statutory conduct, is said not to be punished as such. It is urged by the *Campanale* court that such antecedent conduct is merely a factual basis for making the post-statutory conduct of the identical nature much more severely punishable. Certainly, this type of reasoning aims at avoiding the *ex post facto* problems by simply ignoring the fact that it is necessary to plead and prove acts of misconduct which pre-date the statute. It is said that these acts are not being punished; it is only those occurring after the effective statutory date that are punished — the earlier acts being described, in effect, as the yeast which raises the cake. Such reasoning is a mere play on words.

What is perfectly clear is that, in 1968, the receipt of payments from an employer by a union official was not "Racketeering Activity" — it was merely a violation of 29 U.S.C. §186, and involved punishment consequences far less grave than those imposed by 18 U.S.C. §1963 ($25,000 fine; 20 years imprisonment, or both; and forfeitures).

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4. *Cert. denied*, 423 U.S. 1050 (1976). See memorandum decision in the instant case (Appendix *infra*, 1a).

Thus, by a statutory change effective in 1970 creating the new crime of "Racketeering Activity", Congress sought, unconstitutionally, to accord new and different criminal consequences to prior activity by a defendant which would ordinarily have been time-barred from prosecution. Laws, such as the Act of 1970, which make acts criminal which, when done, were not criminal, or those which increase the seriousness of, or provide a greater punishment for, criminal acts over that which obtained when the acts were committed, fall within constitutional condemnation as being *ex post facto* [*United States v. Henson*, (C.A.D.C. 1973) 486 F.2d 1292, 1305; *United States v. Sherpix*, (C.A.D.C. 1975) 512 F.2d 1361, 1365]. As has been appropriately stated not too long ago by the United States Supreme Court in *Bouie v. City of Columbia*, (378 U.S. 347 at p. 353):

> "An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' *or 'that aggravates a crime or makes it greater than it was, when committed.' Calder v. Bull*, 3 Dall, 386, 390." (Emphasis added; see also *Kring v. Missouri*, 107 U.S. 221, 235.)

And, as is further stated in the *Bouie* case, *supra*, at p. 354:

> "The fundamental principle [is] that 'the required criminal *law must have existed when the conduct in issue occurred*' Hall, General Principals of Criminal Law (2d ed. 1960), at 58-59 . . . ." (Emphasis added.)

In the instant case, the Racketeering Activity Statute of 1970, treats an earlier violation of 29 U.S.C. §186 which would clearly be time-barred, as criminally actionable under the instant indictment, and even makes it more seriously cognizable in

terms of penalties than if it had been originally prosecuted under the Taft-Hartley Act (29 U.S.C. §186). Title 18 U.S.C. §§1961, 1962, thus makes petitioner's pre-1970 crimes more "*aggravated*", or "*greater*" than when they first occurred, and does so by applying itself to acts which took place long before the "Racketeering Activity" statute went into effect. On *ex post facto* grounds, therefore, all of Count 1 and substantial portions of Count 3 should have been stricken and dismissed. It was error of the first magnitude to allow any of these 1968 and 1969 acts of petitioner to form any part of the substantive or conspiratorial allegations of the indictment or the proof at trial. Indeed, the proofs on this subject took up a large part of the record and were so pervasive as to infect and undermine every count in the case.

II.

THE COURT'S RULINGS AND JURY INSTRUCTIONS WERE ERRONEOUS FOR FAILING TO EXPLAIN TO THE JURY HOW, IF AT ALL, THE THREATS AND EXTORTIONATE ACTIVITIES OF PETITIONER AGAINST HIS VICTIMS BORE UPON THE FACTUAL ISSUE OF THEIR BEING HIS ACCOMPLICES AND CO-CONSPIRATORS. IN THIS CASE, MOREOVER, THE GOVERNMENT'S WITNESSES WERE NOT CO-CONSPIRATORS AS A MATTER OF LAW. THE COURT'S RULING PERMITTED THE ADMISSION OF SUBSTANTIAL HEARSAY INFECTING THE VERDICT.

The evidence, if believed, established that petitioner — acting entirely on his own — exacted large cash payments from United Brands in 1968, 1969, 1971 and 1974 as the price for labor peace with his union (the I.L.A.) and to avoid threatened interference by petitioner with the orderly discharge of banana cargoes. A key employee of United Brands acted as the conduit of petitioner's threats to officials of the company who, fearing huge cargo losses from wildcat strikes and walkouts which could likely be instigated by petitioner, acceded to petitioner's alleged demands. For this conduct, petitioner was described by the

prosecutor as a modern-day pirate and a "hold-up" man who

> "conveyed a threat of economic damage [to United Brands] *so vast that this company could not take the risk of saying no.*" (25a).* (Emphasis added.)

Fearing that its huge banana import operations were hostage to petitioner, United Brands, in order to continue its normal and traditional operations, paid to petitioner what he demanded. The company's submission to economic rape — and not to gain special favors — did not cast it into the role of co-conspirator, any more than the payments of a ransom to a kidnapper, or to an airplane hijacker render the victim, family, or the airline, accomplices in the underlying crime. This, the court refused to acknowledge and never gave instructions to the jury on the subject despite defense counsel's repeated flagging of the issue.

In this case, the issue of alleged conspiratorial status was raised at the beginning of the trial by counsel to a court which repeatedly either ignored the issue or promised later instructions which were, however, never given. The trial court's avoidance of the central issue of criminal complicity by United Brands and its employees left the way open to the admission of substantial unreliable damaging hearsay from the putative "executive" co-conspirators. Moreover, the failure to instruct the jury on the issue of whether the United Brands executives were victims rather than accomplices, or even what the hallmarks of conspiratorial conduct are, took away from the jury the entire issue of whether petitioner was guilty of conspiring with others.

Even prior to opening statements, petitioner's counsel objected to any opening statements which would refer to the United Brands executives as co-conspirators (24a). Petitioner's counsel vainly raised this as a "threshold legal point" involving the distinction between "victims" and "co-conspirators" (24a-25a). The court declined to give any instructions on the issue

* References, except where otherwise indicated are to the Appendix in the Court of Appeals.

then, but promised to deal later with the problem (25a).[5] The Government's opening, referring to "piracy," "hold-ups," and "vast" "economic damage" by petitioner then ensued (26a, 27a), thus clearly posing the image of *total* victimization of United Brands by petitioner's threats to interfere with normal and routine operations.

Subsequently, the Government called Beverly Hackmann as a witness. Hackmann was United Brands' labor counsel who testified to the only direct extortionate dealings with petitioner that were adduced during the entire trial. When Hackmann proceeded to testify to conversations he had with a superior (Will Lauer) about petitioner, and what this executive stated to him, objection was raised to hearsay; and the point was vainly pressed that an extortion victim is not automatically an accomplice or co-conspirator (27a-1, 27a-2). The court fobbed off the objection, and gave the jury absolutely no guidance on the question of accompliceship except to say that:

> ". . . you *later* will have to decide whether you believe Mr. Lauer was a co-conspirator or not and whether or not his statements are binding on Mr. Field" (27a-3). (Emphasis added.)

Thus, the trial court allowed into evidence Hackmann's testimony of what Lauer and other company people had told him about the payoffs — but in so doing, the court did not supply any guide whatsoever to the jury on the issue of how to determine what a conspiracy is, how membership in a conspiracy is to be determined, or how the concept of being a victim interfaces with the conspiracy issue in this case.

The same problem, with accompanying objections, surfaced later on with respect to Hackmann's alleged conversation with

5. The trial court sought to assuage petitioner's counsel by stating, that, later on "I will say they have to find that they are co-conspirators and not victims" (25a). The court never honored this promise.

Lauer about pay-off monies being stolen from Hackmann by a burglar prior to one meeting with petitioner (28a-30a); and Hackmann's conversation with Donald Meltzer, a vice-president of finance regarding alleged money demands by petitioner in 1974 (31a-34a).

Counsel for petitioner posted a continuing objection to Hackmann's assertions of what his superiors said to him in conferences relating to the extortion, and counsel made the same objection as to all other company witnesses who would be reporting on the same subject matter (62a, *et seq.*). Thus, counsel for petitioner again requested the court to point up that hearsay statements of a "victim" of an extortion to Hackmann would be inadmissible and that the later testimony of such persons should *not* be received as testimony of a co-conspirator (62a, *et seq.*). The court advised counsel not to repeatedly renew his objections on this subject (62a); and specifically refused to instruct the jury on the issue posed (is a "victim" a co-conspirator?) (62a-64a). Then, the court mistakenly stated that the jury had been instructed on the subject the day before (64a). No such instruction had ever been given (27a-2, 27a-3). All that the court did say a day earlier was that the "law permits statements of somebody who is a co-conspirator with the defendant to be put into evidence through a third person . . ." (27a-3). Absolutely no effort was made at that time, or any time, to explain the law of conspiracy or how to identify a co-conspirator, or what the facts relating to "victimization" have to do with conspiratorial status of the "victim".

Against this background, there was admitted into evidence the testimony of all other alleged co-conspirators who held positions with United Brands (McCauley 81a-90a; Gibbon 91a-97a; Brangwynne 98a-114a; Meltzer 115a-133a; Taylor 134a-137a). Each was introduced to the jury as a co-conspirator and each testified amply with hearsay about conversations had with other alleged co-conspirators in the United Brands Company.

At the conclusion of the Government's case, defense counsel invoking Rule 29, vainly pointed out that no conspiracy could exist between the petitioner and his victims (143a-148a).

Again, at the end of the entire case, petitioner's prior motions were renewed -- and, again denied (232a-233a). And with respect to the requests to charge, petitioner pointedly insisted that the Government's proposed charge No. 17-B improperly cast the United Brands' witnesses, en masse, into the role of co-conspirators (153a-154a). Petitioner's counsel thus vainly argued:

> "MR. FEITELL: I am continuing my objection which I raised a long time ago that they are victims, if anything." (154a).

Against this background, the court delivered a "boiler-plate" conspiracy charge without in any way touching upon the issue of whether victims of an extortion (such as United Brands and its executives) could, or should, be considered co-conspirators (210a-219a). Nor did the court explain how a finding of *non*-conspiratorial status as to any, or all, of the company witnesses would affect the admissibility or use by the jury of their hearsay testimony.

The court's threshold finding of a conspiracy was erroneous (27a-1-27a-3). The proofs before the court, the Government's opening remarks, and its summation, all depicted the threat of extreme financial damage if petitioner's demands were not met. The prosecution called the crime "a shakedown" (161a); "extorted by this man, Fred Field" (161a); "what Mr. Field got was protection money" (162a); and, "if that money wasn't paid, ships would not unload" (166a).

In its opening, the Government characterized the case as one involving "piracy" (25a), and in its closing actually agreed with the defense position on the issue of victimization. Thus, the *prosecutor* summed up, in part, as follows:

> "We all know from the proof in this case that this couldn't be a bribery case. *This has to be an extortion case.*
>
> In an extortion case . . . who is the villain, the guy who is being *forced* to pay out or this oak, I think he was called, who is putting the arm on him for money" (176a). (Emphasis added.)

The trial court erred in deciding, as a matter of law, that the United Brands company and its officers conspired with petitioner. Indeed, the proof on the subject of economic duress was so clear, and the alternative of vast injury to United Brands so persuasive, that the court's wholly unexplained conclusion of conspiratorial activity defies reason. Even if the issue was one of fact, no guidelines at all were posted on this issue to the jury. No instruction was given that the coercion involved, if of a sufficient quantum, could preclude the theory of active complicity in either the charges of Conspiracy, Racketeering or the making of unlawful payments to a labor representative.

To have been co-conspirators with petitioner, the United Brands officials would certainly have had to be aiders and abettors, or principals in the commission of the crimes charged (18 U.S.C. §2). While conspiracy may be a broader crime, it necessarily involves the elements of aiding and abetting [*United States v. Peterson,* (C.A. Va. 1975) 524 F.2d 167]. Thus, the United Brands executives, in order to have been aiders and abettors, would have had to associate themselves with petitioner's venture, and participate "in it as something *that* [*they*] *wishe*[*d*] *to bring about,*"; that is, by their "action to *make it succeed*" [*Nye & Nissen v. United States,* (1949) 336 U.S. 613, 619; *quoting from United States v. Peoni,* (2 Cir. 1938) 100 F.2d 401, 402; *United States v. Manna,* (2 Cir. 1965) 353 F.2d 191, 192, *cert. denied,* 384 U.S. 975, *reh. denied,* 385 U.S. 893; *United States v. Licursi,* (2 Cir. 1975) 525 F.2d 1164, 1167; emphasis added]. Moreover, criminal intent to commit the crimes charged

"must exist in the minds of both the principal and the aider and abettor" [*United States v. Penn*, (2 Cir. 1942) 131 F.2d 1021; *United States v. DeLaMotte*, (2 Cir. 1970) 434 F.2d 289, 293].

There is certainly no basis, upon the facts established in this case, to assume that United Brands, or its officers, "wished to bring about" their own extortion, or that they wished to help the petitioner "succeed" in rendering their own company prey to petitioner's financial lust. Nor can it be seriously contended that those officials of United Brands shared, "in their minds" with petitioner the "criminal intent" which propelled the petitioner forward in reducing United Brands to his vassalage. It was allegedly petitioner who came to United Brands (through its labor counsel) and voiced the fiat of tribute. The company did not approach petitioner for any purpose shown in the record — nor was it claimed that the company promoted or precipitated, the payments by its own prior activities. The company officials thus submitted to petitioner's threats by recognizing or believing, that petitioner had it within his power to stop the importation of bananas ready for marketing and thus to cause extensive and irreparable economic harm to them. Only by acceding to petitioner's demands could the company continue, as it has during every single prior strike, to discharge bananas in Southern ports where I.L.A. workers traditionally gave free passage to perishables. The act of paying over moneys to petitioner upon penalty of vast economic loss, if not other varieties of waterfront terrorism, did not make the reluctant and fearful acquiescence to petitioner's demands a "willful" act on the part of his victims [29 U.S.C. §186(d); *United States v. Motzell*, 199 F. Supp. 192]. The "purpose" of the company officials in surrendering to the will of petitioner was thus, to avoid economic losses of severe magnitude; while petitioner's purpose — as noted by the prosecutor — was "greed", or his own personal gain. Thus, the United Brands executives did not "share the criminal intent or *purpose* of the principal" [*United States v. Varelli*, (7 Cir. 1969) 407 F.2d 735, 749, emphasis added; *Morei v. United States*, (6 Cir. 1942) 127 F.2d 827, 831;

United States v. Rosenblatt, (2 Cir. 1977) 554 F.2d 36]. Nor did they act "willfully" in making such payments as is the requirement of §186 (subd. d) before the giving of a payment can be viewed as criminal. Accordingly, it was clearly erroneous for the trial court to rule, at the threshold, that the United Brands employees were co-conspirators of the defendant [see *United States v. Holder*, (8 Cir. 1977) 560 F.2d 953, 957].

Coercion, threats, pressure, and fear were the amalgam of petitioner's alleged crime. The Government made petitioner's coercive threats the linchpin of its prosecution. Because petitioner's counsel repeatedly urged the point that coercion precluded conspiracy, and brought also to bear the special considerations relating to the non-admission of suspect hearsay,[6] the trial court should certainly, on the record developed, have found that the Government's "company" witnesses were not co-conspirators. [*Hutson v. United States*, (9 Cir. 1956) 238 F.2d 167, 171]. Alternatively, the trial court should have explained to the jury that, if the ability of United Brands to resist petitioner was so substantially impaired that payments to petitioner were unavoidable, the witnesses were not to be considered co-conspirators [see *United States v. Kahn*, (2 Cir. 1973) 472 F.2d 272, 278-9; *United States v. Barash*, (2 Cir. 1966) 365 F.2d 395 (Barash I)]. This, however, the court failed completely to do — thus elevating to the level of binding admissibility each and every offending hearsay statement recounted by these witnesses. This constituted substantial and plain error on the part of the trial court and a violation of due process of law.

Moreover, it should be remembered that, if the United Brands witnesses were not co-conspirators with the petitioner, there was no conspiracy whatsoever [see *United States v. Rosenblatt*, (2 Cir. 1977) 554 F.2d 36, 38-9; *United States v.*

6. Hackmann's claim to superiors that petitioner wanted money was not inherently reliable and there is ample reason to consider whether Hackmann pocketed the funds he procured from United Brands. His alleged payments to petitioner were not verified in any way.

Holder, (8 Cir. 1977) 560 F.2d 953; *Brown v. United States*, 367 F.2d 145, *cert. denied*, 387 U.S. 947].

Below, in the Court of Appeals, it was held that an employer who makes an illegal payment to a union representative is jointly engaged with him in a criminal enterprise. That view completely overlooks the rulings in *Kahn* and *Barash* (*supra*) which concede that a high degree of coercion may effectively transmute a mutual arrangement to commit crime into outright and unavoidable victimization. Moreover, the decision below relies entirely upon a solitary 1961 Second Circuit decision in a case which did not involve the Racketeering statute at issue in this case — which came into being more than a decade later [18 U.S.C. §§1961, 1962; *United States v. Annunziato*, 293 F.2d 373 (2 Cir. 1961), *cert. denied*, 368 U.S. 919]. *Annunziato* focused solely upon 29 U.S.C. §186 — a statute which specifically outlawed in separate sub-sections *both* the giving and receiving of payments as between union officials and employers of union labor. The 1971 Statute dealing with Racketeering, on the other hand is directed against extorsive payments exacted by union officials and does not appear at all to be involved with the far-fetched idea that businessmen may be "Racketeering" against unions by exacting payments from labor organizations. The exaction of monies under threat of some improper penalty or retribution is the crux of the Racketeering statute — and that premise makes sense only against the background of tribute to be garnered from employers as a price for labor peace.

Thus, it is singularly lacking in logic to conclude that the Racketeering statute, in regard to improper payments to labor officials, is governed by the same values which predominated in deciding the much earlier *Annunziato* case, in which both the donor and donee were explicitly denominated as wrongdoers.

Based upon the foregoing, at least as to the Racketeering and Conspiracy convictions in this case, the accompliceship role

assigned by the trial court to employer victims was entirely erroneous.

III.

THE MISDEMEANOR COUNTS FOR RECEIVING A PAYMENT (29 U.S.C. §186) WERE MULTIPLICIOUS TO THE RACKETEERING COUNT (18 U.S.C. §§1961, 1962). ELECTION AND/OR MERGER WAS ERRONEOUSLY DENIED. CUMULATIVE PUNISHMENTS WERE LIKEWISE ERRONEOUS AND CONSTITUTED DOUBLE JEOPARDY.

Petitioner was convicted of receiving payments as a labor official under Counts 2, 3, 4 and 5 (29 U.S.C. §186). These counts alleged the very same criminal violations as are embraced in Count 1, the Racketeering count (18 U.S.C. §§1961, 1962). Count 1 constituted the greater offense as it charged a "pattern" of demanding and receiving payments from an employer. The string of misdemeanor violations described in Counts 2, 3, 4 and 5, was, thus, part of the larger pattern of payments described in Count 1, which latter count elevated these misdemeanors, by reason of their multiplicity, into the more aggravated crime denominated as Racketeering (18 U.S.C. §§1961, 1962).

Defense counsel requested that, as to the foregoing counts, there should be an election because the counts were multiplicious — that is, they depended upon identical proofs to be established (158a-159a). This, the court refused to do (159a-160a), while also stating that the matter would be academic as no increased penalties would be imposed (160a). The court's ruling was wrong; and his assurance of no increased punishment was not observed at the time of sentence in regard to the fines which were cumulated on all counts.

Since the proofs under Counts 2 through 5 necessarily wholly overlapped the proofs under Count 1, the misdemeanor counts should have been stricken, or the Government should have been required to make an election between those counts and the Racketeering count [*United States v. Ploof,* (2 Cir. 1972) 464 F.2d 116, 120-1; *United States v. Stofsky,* 409 F.S. 609, 617-618; *Milanovich v. United States,* (1961) 365 U.S. 551; *United States v. Sperling,* (2 Cir. 1977) 560 F.2d 1050]. Counsel vainly sought to have this election made (158a-159a).

It was, therefore, also erroneous to enter judgments against the petitioner upon the multiplicious counts and these should certainly be vacated, if this were relief of a satisfactory nature [*United States v. Belt,* (8 Cir. 1975) 516 F.2d 873, 875; *Clermont v. United States,* (9 Cir. 1970) 432 F.2d 1215, 1217; *United States v. Golay,* (8 Cir. 1977) 560 F.2d 867, 869-70]. However, even this relief would not be sufficient because if the Government had been required to make an election, it is by no means clear that the election would have left the Racketeering count intact. It would be wholly presumptuous now to conclude that the Government would have insisted upon retention of Count 1, while allowing the four misdemeanor counts to be severed and dismissed. The Government might well have decided against putting all its eggs in one basket (under Count 1) and it might well have opted to sacrifice Count 1 in favor of the four other money demand (§186) counts. In this situation, there is no proper appellate remedy except a retrial on all counts. [See *Milanovich v. United States,* (1961) 365 U.S. 551, 554-5.]

The same is true if the case had gone to the jury with instructions that Count 1 and Counts 2, 3, 4, and 5 were mutually exclusive. Faced with a choice of this sort, there is no way to tell whether the jury would have jettisoned Count 1, or kept it viable while rejecting the other counts [*Milanovich v. United States,* (1961) 365 U.S. 551; *United States v. Belt,* (8 Cir. 1975) 516 F.2d 873, fn. 8, 875-6]. Thus, a new trial on all counts would be necessary.

A fortiorari, the sentences imposed under Counts 2, 3, 4, and 5 were improper. Even though the jail sentences imposed under these counts were concurrent with the one imposed under Count 1 (Racketeering) these convictions necessarily have impact on petitioner's parole status, the habitual offender statutes, impeachment at future trials, and even the place of petitioner's imprisonment. They should, therefore, be vacated because they will collaterally operate to petitioner's prejudice [*Benton v. Maryland,* 395 U.S. 784, 791; *United States v. Belt, supra,* 516 F.2d at 875-6; *Clermont v. United States,* (9 Cir. 1970) 432 F.2d 1215, 1217; *United States v. Holder,* (8 Cir. 1977) 560 F.2d 953, 955-6; *United States v. Lindsay,* (8 Cir. 1977) 552 F.2d 263].

Separate, cumulative $5,000 fines were imposed upon Counts 2, 3, 4, and 5. As these counts were wholly embraced in Count 1, the fines constituted improper multiple punishment for the separate included offenses [*United States v. Sperling,* (2 Cir. 1977) 550 F.2d 1050; *Clermont v. United States,* (9 Cir. 1970) 432 F.2d 1215; *Dear Jung Wing v. United States,* (9 Cir. 1962) 312 F.2d 73, 75; *Costner v. United States,* (4 Cir. 1943) 139 F.2d 429, 432]. Each of these fines should, likewise have been vacated.

IV.

PETITIONER'S CONVICTION UNDER THE HYBRID CONSPIRACY COUNT SHOULD HAVE BEEN ACCORDED MISDEMEANOR STATUS. JUDGMENT ON COUNT SIX, THEREFORE, SHOULD BE VACATED.

Petitioner was charged with conspiracy under 18 U.S.C. §371 and was convicted on that count (No. 6) and sentenced as a felon to a concurrent three year term, of which 12 months is to be in actual custody, and the balance on probation. Petitioner was also sentenced on this count to a $5,000 cumulative fine. This sentence was illegal and should be vacated.

The conspiracy charge against petitioner alleged a two-fold purpose: 1) to violate the Racketeering Act [18 U.S.C. §1962(c)] and, 2) to violate 29 U.S.C. §186 in relation to the making of unlawful payments to a labor union official. While the Racketeering Act charge is a felony, the 29 U.S.C. §186 violation is but a misdemeanor. The cases are clear that where a conspiracy alleges crimes of differing gravity, in the absence of a special verdict, it shall be deemed that judgment is to be entered only upon the lesser crime [*United States v. Quicksey*, (4 Cir. 1976) 525 F.2d 337, 340-1; *United States v. Amato*, (D.C.N.Y. 1973) 367 F.S. 547, 549].

Accordingly, petitioner was entitled to be sentenced under the Conspiracy count as a misdemeanor, the predicate statute being 29 U.S.C. §186 which carries as a penalty a maximum of one year in jail and/or a $10,000 fine. Although the fine, actually imposed upon petitioner here was less than the maximum fine allowed, and the jail term was not in excess of the allowable one (1) year sentence permitted by subdivision d of §186, petitioner was, nonetheless, convicted of a *felony* rather than a misdemeanor, and was saddled with a concurrent two year term of probation.

Section 186 makes no provision for a sentence of probation in addition to a maximum jail term. Such a sentence is excessive, as is the felony label presently affixed to petitioner on this count (18 U.S.C. §1; 18 U.S.C. §3651). Notwithstanding the concurrent sentence exception, the continued existence of this "felony" conviction against petitioner will necessarily involve detriments which warrant a vacatur of both the judgment and sentence upon this count [*Benton v. Maryland*, (1969) 395 U.S. 784, 791-3; *United States v. Belt*, (8 Cir. 1975) 516 F.2d 873, 875; *Clermont v. United States*, (9 Cir. 1970) 432, F.2d 1215, 1217].

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell
Attorney for Petitioner

Dated: New York, New York
May 22, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of April one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE J. EDWARD LUMBARD
HONORABLE J. JOSEPH SMITH,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

FRED R. FIELD, JR.,

Defendant-Appellant.

77-1500

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The trial court did not err in failing to dismiss the conspiracy count and in admitting hearsay testimony of certain United Brands Company employees, since an employee who makes an illegal payment to a union representative is engaged in a criminal enterprise jointly with the recipient. *United States v. Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

2. The supplemental instruction charging counts two through five in the disjunctive was not error since appellant had failed to object to a similar instruction in the original charge. See also *United States v. Cioffi*, 487 F.2d 492 (2d Cir. 1973).

3. Venue on counts eight and ten, charging violations of 26 U.S.C. §7206(1), was proper. It was undisputed that the tax returns were prepared in the Southern District of New York. And, since each return listed appellant's Manhattan address as his mailing address, appellant's accountant mailed the return to that address for signing and filing, and appellant was shown to spend a large amount of time in New York City, there was ample evidence that the return was signed here. *See United States v. King*, 563 F.2d 559 (2d Cir. 1977).

Appendix A

4. Since the fines imposed on counts eight and ten, charging violations of 26 U.S.C. §7206(1), when combined with the fines imposed on counts seven and nine, charging violations of 26 U.S.C. §7201, do not exceed the maximum fine allowable under 26 U.S.C. §7201, there is no basis for vacating the convictions and fines on counts eight and ten. *United States v. Cramer*, 447 F.2d 220 (2d Cir. 1971).

5. 18 U.S.C. §1962(c) does not violate the *ex post facto* clause, since the statute merely increases the penalty for a crime commenced prior to, but continued beyond, the effective date of the statute. *See United States v. Campanale*, 518 F.2d 352, 361 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). Since the racketeering statute contemplates a prolonged course of conduct, the statute of limitations is met so long as at least one predicate offense occurred during the prosecutable period. *Cf. Grunewald v. United States*, 353 U.S. 391, 396-97 (1957).

6. In the context of the entire trial, the prosecutor's remarks during summation cannot be said to have affected the integrity of the trial process. *See United States v. Stassi*, 554 F.2d 579 (2d Cir. 1976); *United States v. Canniff*, 521 F.2d 565 (2d Cir. 1975); *cert. denied sub nom. Benigno v. United States*, 423 U.S. 1059 (1976).

7. The remainder of appellant's arguments on appeal have been waived by his failure to raise them in a timely manner during trial. *United States v. Fuentes*, 563 F.2d 527, 531 (2d Cir.

1977); *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976); *United States v. Private Brands*, 250 F.2d 554 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ J. Joseph Smith
J. JOSEPH SMITH
Circuit Judges